

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 8, 2009 Session

**ROBIN DAWN PARKER v. ROBERT DEWAYNE PARKER**

**Appeal from the General Sessions Court for Putnam County  
No. 024D08 Nolan Goolsby, Judge**

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**No. M2009-00241-COA-R3-CV - Filed November 3, 2009**

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The non-owner spouse appeals the trial court's finding that an increase in equity in the owner spouse's separate property during the marriage is not marital property subject to division under Tenn. Code Ann. § 36-4-121(b)(1)(B). Finding there was no increase in equity during the marriage, we affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court  
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

D. Michael Kress II, Sparta, Tennessee, for the appellant, Robert Dewayne Parker.

Steven D. Qualls, Cookeville, Tennessee, for the appellee, Robin Dawn Parker.

**OPINION**

Robin Dawn Parker and Robert DeWayne Parker agreed to almost all the terms of their divorce in their Marital Dissolution Agreement and all terms governing their parenting responsibilities in the Parenting Plan. The sole issue in dispute before the trial court and on appeal is whether there was an increase in equity in the property serving as the parties' residence such that the equity is a marital asset subject to division.

After holding a hearing, the trial court entered a Final Decree on January 6, 2009 incorporating the Marital Dissolution Agreement and the Parenting Plan. On the sole issue in contention, the trial court made the following findings:

4. The Court finds that the real property located at 6833 Baxter Road in Putnam County Tennessee is the separate property of the Wife. The Court finds that the property was given to the Wife as a gift during the marriage, and the Wife

intentionally held the property out as her separate property during the marriage. The Court further finds that the property was in no way transmuted by the parties, to become marital property.

The Court finds that the Husband may have contributed to the preservation and appreciation of the property, however, he did not substantially contribute to the preservation and appreciation of the property, and therefore is not entitled to any increase in value of the property. The Court further finds that the real property was valued at \$16,600.00 at the time the Wife received the real property, and the value at the time of the divorce is \$15,800.00. Therefore, based upon the proof presented at trial, the property has decreased in value, so same is not an issue.

5. The Court finds that the Husband is not entitled to any value in the real property due to the fact that the parties borrowed certain monies during the marriage and used the real property as collateral. Although the indebtedness was paid down during the marriage, it did not create equity in the real property from the standpoint that the Husband would be entitled to any value. The Court finds that any money that the parties borrowed was used solely to consolidate marital debts, and was not used for any improvements to the real property.

Mr. Parker appeals, claiming the increase in the equity during the marriage is marital property since Mr. Parker substantially contributed to the increase in value.

## **I. STANDARD OF REVIEW**

The trial court's findings of fact are reviewed *de novo* with a presumption of correctness unless the evidence preponderates otherwise. *In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997). However, this presumption only applies to findings of fact, not to conclusions of law, therefore, we review the trial court's resolution of legal issues without a presumption of correctness below. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001). Additionally, great weight is afforded to the trial court's factual findings that rest upon credibility determinations. *In re Estate of Walton*, 950 S.W.2d at 959.

## **II. ANALYSIS**

The property at issue was conveyed to Mrs. Parker as a gift from her father and stepmother during her marriage to Mr. Parker. Under Tenn. Code Ann. § 36-4-121(b)(2)(D), property acquired by gift is Ms. Parker's separate property. Consequently, it is clear, and Mr. Parker does not dispute, that the property itself was and remained the separate property of Ms. Parker.

It is likewise undisputed that the market value of the property declined while Ms. Parker held the property during the marriage so Mr. Parker makes no claim for appreciation of its market value. Mr. Parker, however, claims that since he substantially contributed to an increase in Ms. Parker's

equity in the property, then at a minimum that increase in equity is a marital asset. As it is commonly understood, equity is the value of property in excess of any liens, or mortgages, against it.

The basic facts are not disputed by the parties. The property at issue was a gift to Ms. Parker during the marriage. In effect, Ms. Parker received 100% of the equity in the house at the time of the gift since the property was not subject to any liens. The parties lived in the house during the marriage and Mr. Parker did routine yard work and minor repairs. The parties suffered financial difficulties during the marriage resulting in marital debt. The parties borrowed money to consolidate the marital debt and Ms. Parker pledged the property as collateral to secure the marital debt consolidation loans. Both parties made payments on these loans secured by the property.

Under the governing statutes, separate property that is not to be divided includes, among other things, property acquired by gift. Tenn. Code Ann. § 36-4-121(b)(2)(D). The trial court is to equitably divide marital property between the parties, Tenn. Code Ann. § 36-4-121(a)(1), and marital property is defined by statute, in pertinent part, as:

(1)(B) “Marital property” includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation,

...

(D) As used in this subsection (b), “substantial contribution” may include, but not be limited to, the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager, together with such other factors as the court having jurisdiction thereof may determine.

Tenn. Code Ann. § 36-4-121(b).

Mr. Parker relies on *Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996), for the proposition that since he participated in paying down the marital debt which was secured by a mortgage on the property and assisted in its maintenance, then the resulting increased equity is marital property subject to division.

The Tennessee Supreme Court in *Cohen* held that an increase in equity in property held separately by one spouse *can* become marital property under Tenn. Code Ann. § 36-4-121(b)(1)(B). 937 S.W.2d at 832-33. Finding the statutory language “increase in value” to be all inclusive, the Court decided that if the requirements of Tenn. Code Ann. § 36-4-121(b)(1)(B) are met, then an increase of equity in separate property is marital property subject to division. *Id.*

In *Cohen*, the equity at issue was created by both parties paying down a mortgage used to complete acquisition of the property. Before the marriage, husband acquired a home that had been in his family. *Id.* at 825-26. Husband's father gave him a down payment of \$25,000, and husband borrowed money to pay the remaining purchase price. *Id.* at 832. While the parties were married, the equity in the house increased by \$17,000 as a result of paying down the purchase money mortgage.

Relying on the fact that the mortgage was paid by funds from the parties' joint checking account which was funded by the parties' employment, the Court found the wife made a substantial contribution and the resulting equity was marital property. *Id.* at 833.

[A]n increase in equity in real property, which accrues during the marriage is marital property subject to division upon divorce, notwithstanding the fact that the real property was separate property, if the non-owner spouse substantially contributes to the increase in value.

*Id.* at 833.

In order for equity in separate property to become marital property and subject to division, two prerequisites must be met: there must be an increase in equity during the marriage and the non-owner spouse must have made a substantial contribution to the increase in equity.

For our current purposes, it should be noted that an increase in equity does not necessarily increase the market value of property to third persons, but it does increase the value to the owner spouse. The effect of the ruling in *Cohen* is that *if there is an increase in value to the owner spouse*, whether or not the market value has increased, due to the substantial contribution of a non-owner, then that increase in value is marital property subject to division.

While Mr. Parker cites language from *Cohen* that would appear to support his position, we find *Cohen* and its progeny distinguishable. First, there was no increase in equity in the subject property during the Parkers' marriage as described in *Cohen*. The court in *Cohen* addressed itself to whether "an increase in equity in real property is subject to division as real property." 937 S.W.2d at 832. The Court explained the increase at issue was the increase in equity "between the date of the marriage and the date of the divorce." *Id.*

Ms. Parker held 100% of the equity in the subject property at the time of the gift. Consequently, between the time Ms. Parker received the gift and the date of the divorce there was no increase in equity in the property during the marriage. In other words, unlike *Cohen*, there was no increase in value to Ms. Parker. Together with the fact that the property's market value did not

appreciate, there was no increase in any value. Since there was no increase in value, then under Tenn. Code Ann. § 36-4-121(b)(1)(B), there was no marital property created subject to division.<sup>1</sup>

Second, it would be manifestly unfair to find that *Cohen* applied to this different factual situation. The ruling in *Cohen* reflected equity since the wife contributed in the acquisition of an asset which was husband's separate property. This increase in equity was deemed marital property subject to division. Otherwise, wife would have participated in acquiring property for husband, and reducing the amount of money owed on that property, but would have received nothing while husband would receive a windfall. The circumstances of this case are quite different. Mr. Parker did not participate in any way, substantially or otherwise, in the acquisition of the property. Ms. Parker received 100% of the equity in the house as a gift. The loans at issue were not to acquire or improve the home but to pay off marital debt. The mortgage at issue was not to acquire or improve the property but to secure a loan to pay marital debt. Mr. Parker did not help Ms. Parker acquire the house or in any way increase its value, and Ms. Parker is not receiving a windfall at Mr. Parker's expense.

Ms. Parker asks this court to award her attorneys' fees incurred in this appeal. This appeal did not involve enforcement of a marital dissolution agreement, child support, or alimony. Consequently, the only basis for an award of attorneys' fees would be a finding that this was a frivolous appeal. Based on the arguments made herein, we decline to make such a finding.

The trial court is affirmed. Costs of appeal are taxed to Robert Dewayne Parker for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.

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<sup>1</sup>Since there was no increase in value as required by *Cohen*, Mr. Parker's contributions to increased value are not relevant. Even if Mr. Parker's contributions were at issue, we cannot find the trial court erred when it held his contributions were not substantial.